E: 4410-09-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 19-18]

Robert Wayne Locklear, M.D.; Decision and Order

I. Procedural History

On March 26, 2019, the Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Robert Wayne Locklear, M.D., (hereinafter, Respondent) of Johnson City, Tennessee. Administrative Law Judge (hereinafter, ALJ) Exhibit (hereinafter, ALJX) 1 (OSC), at 1. The OSC proposed the denial of Respondent's application for a DEA Certificate of Registration, Application Control No. W18124612C, "pursuant to 21 U.S.C. § 824(a)(2) & (a)(5), because [Respondent has] been convicted of a felony related to controlled substances and because [he has] been excluded from participation in a program pursuant to section 1320a-7(a) of Title 42." *Id.*

Specifically, the OSC alleged that, on October 8, 2014, Judgment was entered against Respondent in the United States District Court for the Eastern District of Tennessee (hereinafter, E.D. Tenn.) "after [Respondent] pled guilty to: one count of 'Conspiracy to Distribute a Quantity of Cocaine Base,' in violation of 21 U.S.C. §§ 846 & 841(b)(1)(C); and one count of 'Conspiracy to Defraud a Health Care Benefit Program,' in violation of 18 U.S.C. §§ 1347 & 1349." *Id.* at 2 (citing *U.S. v. Robert Wayne Locklear*, No. 2:14-CR-38 (E.D. Tenn. Oct. 8, 2014)). The OSC alleged that Respondent's conviction of a felony related to controlled substances warrants the denial of Respondent's application pursuant to 21 U.S.C. § 824(a)(2).

The OSC further alleged that "based on [such] conviction, the U.S. Department of Health and Human Services, Office of Inspector General ('HHS/OIG') mandatorily excluded [Respondent] from participation in Medicare, Medicaid, and all Federal health care programs

pursuant to 42 U.S.C. § 1320a-7(a)." *Id.* The OSC stated that this exclusion took effect on June 18, 2015, and "runs for a period of ten years," and that such exclusion "warrants denial of [Respondent's] application for DEA registration pursuant to 21 U.S.C. § 824(a)(5)." *Id.*

The Order to Show Cause notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 2-3 (citing 21 C.F.R. § 1301.43). The OSC also notified Respondent of the opportunity to submit a corrective action plan. *Id.* at 3-4 (citing 21 U.S.C. § 824(c)(2)(C)).

On April 8, 2019, Respondent timely filed a request for a hearing, in which he affirmed his conviction and stated that he "developed a severe addiction to cocaine and alcohol" and that he had been "clean and sober and active in Recovery since June 27th, 2013." ALJX 2 (Request for a Hearing, at 2).

The matter was placed on the docket of the Office of Administrative Law Judges and assigned to Chief Administrative Law Judge John J. Mulrooney II (hereinafter, the Chief ALJ). On April 10, 2019, the ALJ established a schedule for the filing of prehearing statements. ALJX 3 (Amended Order for Prehearing Statements), at 1-2. The Government filed a Motion for Summary Disposition on April 16, 2019, alleging that there was no genuine issue of material fact and separately filed a Prehearing Statement on the same date. ALJX 4 (hereinafter, Govt MSD) and ALJX 5 (hereinafter, Govt Prehearing). Respondent *pro se* filed a Motion for Continuance requesting a delay in the prehearing while he awaited a response on his Corrective Action Plan.[1] ALJX 7 (Motion for Continuance). The Chief ALJ denied the Motion for Continuance, because "the filing and pendency of a corrective action plan, standing alone, presents no impediment to proceeding as scheduled or any cognizable justification for a continuance . . . ." ALJX 8 (Order Denying Respondent's Motion for Continuance). On May 3, 2019, Respondent *pro se* filed his Prehearing Statement. ALJX 9 (hereinafter, Resp Prehearing). The Chief ALJ issued a

[1] Respondent did not introduce the Corrective Action Plan into the record.

Prehearing Ruling on May 10, 2019, which, among other things, set out six stipulations[2] already agreed upon and established schedules for the filing of additional joint stipulations and supplemental prehearing statements. ALJX 10 (Prehearing Ruling). On May 17, 2019, Respondent filed a Notice of Appearance of counsel and filed requests for continuance and extension of time as a result of obtaining counsel, which the Chief ALJ considered in amending his prehearing deadlines. ALJX 11-15.

On June 13, 2019, Respondent filed a Response to Government's Statement of Undisputed Material Facts and Statement of Additional Undisputed Material Fact of Respondent Robert Wayne Locklear, M.D., in which he confirmed the previous stipulations, but clarified that "on the day he was arrested by the Drug Task Force that, although he never sold any, he shared some illegal substances with others that same day." ALJX 16, at 2. On that same date, Respondent also filed a Response to Motion for Summary Disposition of Respondent Robert Wayne Locklear, M.D., in which he argued that material facts exist related to why Respondent can be entrusted with his DEA registration, and that Respondent "is no longer a threat to the public . . . ." ALJX 17 (Respondent's Response to MSD), at 6-7. Further on that same date, Respondent filed a Second Prehearing Statement of Respondent Robert Wayne Locklear, M.D. (hereinafter, Resp Supp Prehearing). ALJX 18. On June 18, 2019, the Chief ALJ denied the Government's Motion for Summary Disposition, finding that "the Agency has established that where the Government has met its burden by making a *prima facie* case for sanction, the burden of production then shifts to a respondent to show that, given the totality of the facts and circumstances in the record, denial or revocation [of] the registrant's registration would not be appropriate." ALJX 20, at 8 (citations omitted). I have reviewed and agree with the procedural rulings of the Chief ALJ during the administration of the hearing.

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[2] The Stipulations included the fact that Respondent voluntarily surrendered for cause his previous DEA registration on July 8, 2013; the fact that Respondent was excluded from participation in Medicare, Medicaid, and all Federal health care programs pursuant to 42 U.S.C. § 1320a-7(a) effective June 18, 2015; the fact that on October 8, 2014, Respondent was convicted in E.D. Tenn. Of one count of "Conspiracy to Distribute a Quantity Cocaine Base" and one count of "Conspiracy to Defraud a Health Care Benefit Program;" and the fact that Respondent received a conditional medical license in the State of Tennessee on November 16, 2018. ALJX 10, at 2.

The hearing in this matter spanned one day.[3] On August 29, 2019, the Government filed its Proposed Findings of Fact and Conclusions of Law and Respondent filed his Proposed Findings of Fact and Conclusions of Law of Respondent Robert Wayne Locklear, M.D. ALJX 26 (hereinafter, Govt Posthearing); ALJX 25 (hereinafter, Resp Posthearing). The Recommended Rulings, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge (hereinafter, RD) is dated September 11, 2019. On October 8, 2019, the Chief ALJ transmitted his RD, along with the certified record, to me, and certified that no exceptions were filed by either party. ALJ Transmittal Letter, at 1.[4]

Having considered this matter in the entirety, I find that Respondent has been convicted of a felony related to controlled substances and has been excluded from participation in a program pursuant to section 1320a-7(a) of Title 42, and that therefore, there is a basis to deny Respondent's application. *See infra* III. I further find that, given the facts on the record, Respondent has not established sufficient mitigating evidence to assure me that he can be entrusted with a controlled substances registration.

I issue this Decision and Order based on the entire record before me. 21 C.F.R. § 1301.43(e). I make the following findings of fact.

II. FINDINGS OF FACT

A. Stipulations

[3] Hearings were held in Knoxville, Tennessee on July 30, 2019.

[4] Respondent filed a Motion to Reopen the Record on January 21, 2021 (hereinafter, Resp Mot to Reopen), which the Chief ALJ denied on January 25, 2021. The Respondent noted in this filing that Respondent should be allowed to reopen the record for the submission of new "material evidence," because the Respondent believed that the Chief ALJ "took issue with Dr. Locklear's intention to imminently petition the Board for removal of the practice monitoring requirement" and asserts that despite such removal, Respondent maintains the advocacy of the Tennessee Medical Foundation. Resp Mot to Reopen, at 2. I found evidence in the record transmitted to me on October 8, 2019, that supported the finding that Respondent would be required to maintain the Tennessee Medical Foundation's advocacy in order to maintain his medical license. *See infra* n.12. Specifically, in addition to Respondent's testimony that he would continue to have the Tennessee Medical Foundation's advocacy for life, Tr. 129, the conditions on Respondent's medical license required the maintenance of the "advocacy of the Tennessee Medical Foundation for the duration of time that [he is] licensed in Tennessee." RX 17, at 1. Therefore, although Respondent's proposed evidence may be more current, that finding has already been included in the record. Further, I do not find the continuance of this advocacy or the removal of the practice monitor to ultimately affect my final decision in the matter. As explained in *infra* IV, Respondent has repeatedly evaded accountability measures in the past, and I cannot entrust him with the responsibility of a controlled substances registration.

1. Respondent's DEA Registration

On November 21, 2018, Respondent filed an application (Application Control No. W18124612C) for a DEA Certificate of Registration as a practitioner in schedules II-V, with a proposed registered location at Recovery Associates Inc., 401 E. Main St., Ste 3, Johnson City, Tennessee 37601-4891. Government Exhibit (hereinafter, GX) (Certificate of Non-Registration) 1, at 1; *see also* RD, at 3 (Stipulation (hereinafter, Stip) 1).

On July 8, 2013, Respondent submitted a Form DEA-104, Voluntary Surrender of Controlled Substances Privileges, surrendering his previous DEA Registration Control No. BL7274107. GX 2 (DEA-104); *see also* RD, at 3 (Stip 2).

2. Respondent's Conviction

On October 8, 2014, judgment was entered against Respondent in the United States District Court for the Eastern District of Tennessee (hereinafter, E.D. Tenn.) after the Respondent pled guilty to one count of "Conspiracy to Distribute a Quantity of Cocaine Base," in violation of 21 U.S.C. §§ 841(b)(1)(C) & 846, and one count of "Conspiracy to Defraud a Health Care Benefit Program," in violation of 18 U.S.C. §§ 1347 & 1349." *U.S. v. Robert Wayne Locklear*, No. 2:14-CR-38 (E.D. Tenn. Oct. 8, 2014)). RD, at 3 (Stip 3); *see also* GX 3 (Plea Agreement) and GX 4 (Judgment in a Criminal Case).

3. Respondent's Exclusion

Based on the Respondent's conviction, HHS/OIG mandatorily excluded the Respondent from participation in Medicare, Medicaid, and all federal health care programs under 42 U.S.C. § 1320a-7(a). RD, at 4 (Stip 4). The exclusion was effective on June 18, 2015, and runs for a minimum period of ten years. *Id.*; *see also* GX 5 (Exclusion Letter), at 1.

4. Respondent's State License

The Respondent received a conditional medical license in the State of Tennessee on November 16, 2018. RD, at 4 (Stip. 6); *see also* RX 17 (Letter from the Board of Medical Examiners); RX 18 (Conditional Medical License).

B. The Government's Case

The Government's documentary evidence consists primarily of records supporting the stipulated facts. GX 1-6. The Government called one witness, a Diversion Investigator (hereinafter, the DI). RD, at 4; Tr. 17-33. The DI testified that she has been employed by DEA for approximately eleven years and as a DI for over three and a half years. Tr. 18. The DI testified that she became familiar with Respondent due to his answers to the liability questions on the DEA application and she testified as to the basis of the Government Exhibits 2-6. *Id*. at 18-30. The Chief ALJ found, and I agree that the DI's testimony "was primarily focused on the non-controversial introduction of documentary evidence and her contact with this case" and "merits full credibility in these proceedings." RD, at 6.

The Government's evidence includes the Plea Agreement in Respondent's criminal case, the stipulated facts of which describe Respondent's conspiracy to defraud a health care benefit program and his interactions with law enforcement regarding his crack/cocaine use, including his conspiracy to distribute. Regarding Respondent's drug charges, the plea agreement stated:

> Between the approximate month of January 2013 and continuing through the month of July 2013, in the Eastern District of Tennessee and elsewhere, conservatively, the defendant did knowingly, intentionally, and without authority, conspire with at least one other person to distribute approximately at least 5.6 but less than 11.2 grams of a mixture and substance containing a detectable amount of cocaine base ("crack"), a Schedule II controlled substance.

GX 3, at 3.

The plea agreement further detailed that Respondent had smoked crack cocaine prior to seeing patients on May 13, 2013. *Id.* at 5. On June 5, 2013, police seized crack cocaine from Respondent, and he admitted that "he had a drug problem" and that "he had been smoking crack a few times a day (before, during and after work)." *Id.* On June 11, 2013, Respondent was arrested and crack cocaine was seized from his person. *Id.* He admitted that "a total of $2,000 worth of crack cocaine was purchased that morning and that he and several others smoked some of it" and that "he gave the dealer from Knoxville and her friends approximately $200 to $300 worth of crack cocaine to help them out." *Id.* at 6-7.

In addition to his drug use, the plea agreement provided details as to Respondent's unlawful actions regarding his conspiracy to defraud a health care benefit program. *Id.* "The [Respondent] operated two businesses in the Eastern District of Tennessee: Trinity Internal Medicine and Sleep ('TIMS') and Trinity Recover Clinic ('TRC'). TIMS was a primary care medical practice . . . TRC was operated as an office based substance abuse treatment program . . . ." *Id.* at 3. The Plea Agreement stated that, "[d]ue primarily to his usage of crack cocaine and alcohol, the defendant was frequently physically absent from the medical practices TIMS and TRC during periods when the medical practices were open for business and providing medical services to patients who were enrolled in health care benefit programs." *Id.* at 8. According to the plea agreement, while Respondent was absent, he "told office staff to see patients and prescribe medications, including Suboxone in his absence," even though he "knew that no employee/medical assistant at his practice was properly licensed or trained to provide these requisite medical services." *Id.* Further, the plea agreement states that Respondent "often did not examine, interview or treat the patients on return visits, was often absent from the practice when the patients returned and thus did not attend to or assess the patients' medical conditions." *Id.* at 9.

The plea agreement concluded that Respondent's absence from the office "caused the pharmacies to submit claims to health benefits programs and receive reimbursement for prescriptions that had been issued outside of the usual course of professional practice and without a finding of medical necessity." *Id.* Additionally, "laboratory service providers [] submitted claims to health care benefits programs . . . when in fact, the testing had not been reviewed or directed by [Respondent] for the purpose of diagnosing or treating a medical condition." *Id.* Furthermore, "[o]n numerous occasions, drug screens came back positive for the presence of other scheduled drugs such as marijuana or heroin, but the patients continued to have their Suboxone prescriptions called in anyway." *Id*. at 9. The plea agreement provided numerous examples of the claims filed to health care benefits programs and found: "an

approximate total of 150 dates of service where a prescription was issued and [Respondent] was not present to examine the patient;" "the total amount of loss to be applied in this case, conservatively, is more than $120,000 but less than $200,000;" and that "this offense involved 10 or more victims (health care benefit companies)." *Id.* at 13.

C. The Respondent's Case

Respondent submitted documentary evidence including records related to his conviction, sentencing, probation, treatment for substance abuse, and medical license. *See* Respondent's Exhibits (hereinafter, RX). Respondent also testified on his own behalf and submitted an affidavit signed by himself[5] and testimony of character witnesses, coworkers, and family members. Tr. 33-167; RX 7.

Respondent testified that he attended Duke Medical School. Tr. 50-51. He admitted that "second year of medical school, [he] began experimenting with crack, and it took [him] down very fast, very quickly." *Id.* at 149.

After medical school, Respondent testified that he practiced at Takoma Medical Center from 2002 to 2012 in "internal medicine." *Id.* at 51. Respondent stated, "I had moved out of my home [in] approximately 2005 because I wanted to—I wanted to drink, drug[6] and womanize. And in 2008, my [wife]—she had had enough . . . and we divorced in 2008. And then my drinking continued to get worse. At this point, I hadn't started back drugging. I had done some drugs back when I was in college, in medical school, but I hadn't started back." *Id.* at 52. In 2012, he testified that his employer at Takoma Medical Center "asked [him] to leave because of [his] erratic behavior with [his] drinking. So [he] went and opened up [his] own practice in 2012, and it wasn't a month after [he] was in private practice that [he] started using drugs again." *Id.* Respondent stated that "a big part of it was at that point [he] had no accountability."[7] *Id.*

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[5] The Chief ALJ noted, and I agree that this affidavit was allowed into the record with the caveat that it would be subject to cross-examination at the hearing. RD, at 15-16 n.43.

[6] It is noted that this is inconsistent with what Respondent said a few sentences later, that he "hadn't started back drugging." Tr. 52.

[7] It is unclear what Respondent meant by this statement. The record demonstrates that as a result of this behavior, he lost his practice, medical license and was arrested and went to jail. Additionally, he had previously almost been

Respondent further testified that he and his wife reconciled in 2012, when he was "at the height of [his] drug addiction," before he was arrested and that he "tormented her and put her through H-E double L." *Id.* at 55. Since the arrest, he stated that he turned his life around. He said, "I was completely broken and I wanted to do whatever was recommended so that I could get better. I had a baby on the way, and grown kids, and a—and a woman at this time who was not my wife again, but who loved me, and so I did—I followed the suggestions, went to church, went to meetings, did whatever was recommended I do." *Id.* at 56.

Respondent introduced a letter from Talbott Recovery Campus in Atlanta, Georgia (hereinafter, Talbott), which stated that he had "successfully completed all phases of his treatment program." RX 8. He testified that he competed a 90-day inpatient program there, because "the judge allowed me—offered me to go to rehab if—to get out of jail." Tr. 65-66. When asked if there was bail, Respondent stated, "I was initially given bail and initially released, but I ran the first time." *Id.* at 67. He explained that after his arrest, he went to rehab in Alabama at Bradford Health Services (hereinafter, Bradford), where he was for about "six days," but he "wanted to use drugs," and so he escaped and was later "picked up by a bounty hunter" after he had been living with other drug addicts for a few days. *Id*. at 69-70. Then Respondent testified that he then went to jail[8] for eleven days and "unbelievably, the judge allowed me to go—to leave again and go to rehab within 11 days." *Id.* at 71. When asked why he went to Talbott instead of Bradford, Respondent stated, "[w]e didn't want to go back to Bradford, and we told the judge that Bradford wasn't good for me, when it really wasn't Bradford, it was me. But we—it was an angle to go somewhere else." *Id.* at 73. Respondent further explained that it was "an excuse to maybe try something different" and he did not "know that Bradford would have even taken [him] back." *Id*. at 74.

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removed from medical school, been divorced and been required to leave his job at Takoma Medical Center due to his addiction. I disagree with the statement that he had no accountability—it instead appears that he did not regard these consequences as important at the time.

[8] Respondent testified that he lost his bail, and he could not remember how much it was, but his wife could probably remember. Tr. 70-71. Later, when asked about whether there was bail after his time at Talbott, he stated, "It's fuzzy. I think there might have been, Judge. Honestly, I don't know." *Id.* at 78.

Respondent submitted his first agreement with the Tennessee Medical Foundation, which memorialized his sobriety date as June 27, 2013, and was signed prior to his admission to Talbott's rehabilitation program on January 26, 2013. *Id.* at 85; RX 12, at 7. After he was released from Talbott on October 6, 2013, Respondent testified that he "went home, and it was about a year and a half before [he] got sentenced to prison." *Id.* at 78; RX 7, at 2; RX 8, at 1. After his year in prison, Respondent was released early and signed up for a halfway house through which he completed another rehabilitation program. *Id.* at 82-84; RX 13.

Respondent testified that he pled guilty in federal court, "because he was guilty" and that he was "[v]ery. Very sorry." *Id*. at 34. He testified that he was sentenced to two years in a penitentiary, "but served only one because [he] completed a drug program in prison." *Id.* He stated that after prison, he held various jobs making pizza dough, working as a secretary and a personal trainer, and then in 2016, he "got a job as a peer counselor in a drug treatment program," because he "felt like it was [his] purpose." *Id*. at 35. Respondent stated that he worked at East Tennessee Recovery and for the past two years, he has been working at Recovery Associates. *Id.* at 36.

Respondent stated that he wanted to get his medical license back because he "was in recovery and wanted to help people." *Id.* at 58. To regain his medical license, he had to "do a competency evaluation," which he passed. *Id.* Respondent testified that he is "closely monitored" through the Tennessee Medical Foundation and that monitoring includes: random drug screens that began an average of "once a week to once every two weeks" and are now "about once a month;" checking in every morning seven days a week to see if Respondent requires a screen that day, and "on occasion, they ask [him] to do a nail sample;" going to "a Caduceus[9] meeting once a week;" and, "[he has][10] to go to three—at least three other 12-step

[9] A Caduceus meeting is "a meeting for physicians and other health care professionals in recovery, a peer support group." Tr. 38.

[10] The Chief ALJ asked Respondent if it was "mandated to go to Caduceus plus the three other 12-step recovery" every week, and Respondent answered affirmatively. Tr. 40

recovery meetings a week outside of that, so at least four meetings a week." *Id.* at 38. Further, Respondent testified that he "meet[s] with a supervisor every three months who reports to the Tennessee Medical Foundation. We have to participate in a retreat once a year." Respondent added that he has to meet with a counselor and "licensed addictionologist once a quarter to be evaluated," and the addictionologist is a psychiatrist and also monitors his depression. *Id.* at 60. He stated that if he did not meet the requirements of the Tennessee Medical Foundation, "they would report me—report me immediately to the board and my license would be revoked." *Id.* at 60-61. Respondent introduced into evidence his second agreement[11] with the Tennessee Medical Foundation, which was executed on January 11, 2016, and expires 5 years after its date of execution. RX 16, at 2. Respondent further submitted a letter, dated October 12, 2018, from the Tennessee Board of Medical Examiners, which granted him a conditional medical license, and among other things, required a practice monitor for six months and the maintenance of the "advocacy of the Tennessee Medical Foundation for the duration of time that [he is] licensed in Tennessee."[12] RX 17, at 1.

Respondent also submitted a letter from the Tennessee Medical Foundation, which was written at the request of his malpractice insurance that states that Respondent is "in compliance with all of the requirements of his monitoring contract." RX 15, at 1; Tr. 97-101. The purpose of Respondent's controlled substances registration, Respondent testified, would be to work in addiction medicine at Recovery Associates, and also to open up a practice with his wife, based

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[11] This agreement, as well as the first agreement, included a provision to which Respondent agreed stating, "I will not seek employment or work in pain medicine, addiction medicine, or any medication assisted treatment (MAT) center for a minimum of the first 2 (two) years under the [] contract." RX 16, at 6; RX 12, at 6.

[12] Respondent testified that when his five years expired with the Tennessee Medical Foundation, he would enter a new contract and that he and the foundation "both agreed that [he] need[s] to be on a lifetime contract." Tr. 129. Although the Chief ALJ had noted that Respondent's agreement was expiring shortly, RD, at 36, I find that the record supports that even if certain restrictions, such as the practice monitoring were lifted, Respondent would likely continue to have some sort of accountability monitored through the Tennessee Medical Foundation for the duration of his medical license. The language in his conditional license was clear that this would be a requirement for "the duration of time that [he is] licensed in Tennessee." RX 17, at 1. Therefore, I find that the record support that Respondent will maintain the Tennessee Medical Foundation's advocacy for the duration of his practice of medicine. I also have found below that even with the full accountability measures in place, Respondent has not demonstrated that he can be entrusted with a controlled substances registration. *See supra* IV.

on direct primary care "where patients pay a certain fee a month to get unlimited access to the physician," because Respondent is excluded from federal health care programs. Tr. 103-05.

Respondent testified that his supervisor at Recovery Associates Dr. H.[13] "has a terminal illness and that's why he's not able to be here today. And he's been very supportive and encouraging for me." *Id.* at 47. Respondent stated that Dr. H. was scheduled to testify, but he has "end stage myeloma, and he is bedridden at the moment." *Id.* at 138. When asked on cross examination how Dr. H. is "effectively monitoring" his practice if he is ill, Respondent stated that "he has been monitoring me up to this point, but there's other doctors there that are also involved" and that Dr. H. was onsite "about a week and a half ago." *Id.* at 140. Respondent responded affirmatively to the follow up of whether the Tennessee Medical Board knows that Dr. H. is too ill to be on site monitoring his practice. *Id.* Then he said, "Well, let me—let me rephrase that. I don't—I haven't said anything to the Tennessee Medical Board, and at this point I don't practice." *Id.* at 141. Respondent admitted that he is required to have a practice monitor by the medical board and Dr. H. is that practice monitor.[14] *Id.* He then shifted his position and stated that when Dr. H. is not there, "then what I do—I occasionally see patients individually, and then I give the patient charts to the doctor, but then they see the patient themselves individually." *Id.* at 142. The Chief ALJ asked whether Dr. H. was "not there 50 percent of the time now, and he's not going to be there 50 percent of the time if he has end stage multiple

[13] Respondent also testified that his conditional medical license "means that I can only practice for a certain physician [Dr. H]." Tr. 121.

[14] Respondent's conditional medical license required reporting from his practice monitor every month for six months, which started on the effective date of November 14, 2018; therefore, six months had likely passed before Dr. H. became bedridden before this hearing on July 30, 2019; however, the letter from the Board states that Respondent must "petition for an Order of Compliance to have the monitoring requirements lifted." RX 17, at 1. Respondent testified that he was going to ask for the conditions on his license to be removed, "as soon as [he] can get the paperwork in" and "imminently." Tr. 133. Therefore, although the period of six months had elapsed, the conditions on his medical license leave open the question of whether Respondent might have been required to have a practice monitor at the time that Dr. H. became ill. This raises a concern, because Respondent testified that he had not notified the Board or the Tennessee Medical Foundation about Dr. H.'s inability to monitor him. *Id.* at 141. Ultimately, as explained below, Respondent's other egregious behavior is more compelling in deciding a sanction in this case, but both Respondent's change in answers regarding this topic and his lack of communication with the Board or the Tennessee Medical Foundation certainly raise concerns about my ability to trust him.

myeloma, right?" *Id.* at 145. Respondent answered, "He has been—he's been around for a while. He's had—he's had it for 10 years, 11 years. He's just not there to—right now." *Id.*

Regarding Respondent's plans for his controlled substances registration, Respondent stated that his "training is internal medicine, so what [he'd] be doing . . . [he'd] be treating adults for medical issues, anything from diabetes, to COPD, to congestive heart failure to hypertension." *Id.* at 48. When asked how he plans to work with drug addicts, he stated that he "feel[s] confident that [he has] a strong support system in place." Tr. 128-29.

Respondent testified that he accepts responsibility and is remorseful for both the felony and the exclusion. Tr. 134-35. When asked why he believes he can be a responsible DEA registrant, Respondent answered, "I think that the same—it's the same reasons I can be—I'm responsible with the—with the things that I've been given so far. The last thing I want to do—I—I'm not the same person I was. I've been rehabilitated. The last thing I want to do is hurt someone." *Id.* at 136. When asked whether "working with patients who are being treated for substance abuse puts [him] at increased risk for relapse [him]self," he admitted that "[t]here are times it can be a trigger, yes." *Id.* at 137. He testified, "I work in an environment—I make sure I work in an environment that's recovery-oriented, that most[15] of the people there are in active recovery, so they not only—I'm not only accountable to my support system outside of work, I'm accountable at work." *Id.*

The Chief ALJ asked Respondent about his previous rehabilitation efforts and Respondent admitted that "second year of medical school, [he] began experimenting with crack, and it took [him] down very fast, very quickly." *Id.* at 149. When asked by the Chief ALJ, he admitted that at the time, he had started the clinical portion and was "in and out of a support role in patient care," while he was experimenting with crack. *Id.* at 149-50. Respondent admitted

[15] Respondent noted that 100 percent of the patients are being treated with buprenorphine and that the typical course of treatment time is "at least two years" and that when someone gets off buprenorphine, "[t]hey usually just don't show back up." Tr. 125-26. Later, he stated, "They don't come back, so they're discharged, but we don't know why they're not coming back, oftentimes." *Id.*

that he was "directed to rehab by the faculty at Duke" after he "went to the emergency room" and he had to go to inpatient rehab for 30 days and then was sober for five years. *Id.* at 151. Respondent testified

> I was being monitored by the medical school and the residency program, so as soon as that monitoring was lifted—but all along, I had it in the back of my head that I could drink. I still thought I could drink. I knew I couldn't do drugs, but I thought I could drink successfully. But I couldn't drink while I was being monitored, so as soon as the five years was up and I no longer had any supervision, I had it in my head I was going to drink, and I did."

Id. at 152.

He then stated that he had to leave Takoma Hospital because of a "culmination of events related to [his] drinking," including "not showing up for work, being erratic, outbursts" and he was sent to the Tennessee Medical Foundation for an evaluation, during which he "lied, and Tennessee Medical Foundation recommended some inpatient programs or some retreats for [his] depression and trauma issues, but [he] never followed through." *Id.* at 154. He stated that he was asked to leave Takoma because of the refusal to complete rehabilitation and "inappropriate behavior" and he sometimes showed up to work in an "incapacitated status." *Id.* at 155. But then he retracted and clarified that he was not under the influence at Takoma and that it was really the inappropriate behavior in texting a colleague that precipitated his departure from Takoma. *Id.* at 156.

Respondent admitted that during the time leading up to his arrest, he was not showing up to work, and that as a result, "there were other people making decisions about controlled substances who weren't qualified to do that" and doing so was "extremely" dangerous and "[he] put them at risk, as well as the patient." *Id.* at 160. He said that he believed that he was successful at Talbott's rehabilitation program because he "was in jail long enough" and "because [he] had the right mindset by that point." *Id.* at 164.

Regarding Respondent's credibility, the Chief ALJ found that:

> As the witness with the most at stake at the hearing, the Respondent is certainly imbued with the largest motive to embellish and fabricate. Additionally, it cannot escape notice that the Respondent has a lengthy history of convincing responsible, experienced

> professionals of his sincerity. He has convinced medical school administrators, rehabilitation professionals, physicians, a judge and family members that he has periodically been rehabilitated.

RD, at 18. The Chief ALJ further noted "internal inconsistencies in the Respondent's testimony . . . ." For example, he found that Respondent testified at first that his TMF monitor was unavailable to testify because he was bedridden, and when asked whether he had notified the TMF that his monitor was unable to monitor him, Respondent stated that he had not, "then said (contrary to prior testimony) that monitoring was unnecessary because he was not practicing." *Id.* The Chief ALJ also noted that Respondent admitted to lying to Takoma Hospital and TMF, *id.* (citing Tr. 154), and lying so that a District Court Judge would send him to a different rehabilitation facility, *id.* The Chief ALJ concluded that "there were biographical elements and other areas where the Respondent's testimony could be credited. However, where the Respondent's testimony conflicts with objective, established facts of record, other evidence and testimony in the record, and common sense, that testimony must be viewed with robust skepticism." *Id.* at 18-19. I agree with the Chief ALJ, and although I appreciate Respondent's honesty about his previous incidents of lying to a Judge to get what he wanted, it makes it very difficult for me to be able to trust that he is not being honest now as an angle to manipulate my decision. *See* RD, at 18. I also find that there were additional moments of inconsistency, such as when he discussed the reasons for his dismissal from Takoma—at first he stated that he had erratic behavior, such as outbursts and not showing up to work, Tr. 154, but then he insisted that he was never impaired at Takoma and that he was really dismissed because of his inappropriate texting, *id.* at 156. I find it unlikely given the "erratic" behavior and tardiness that he was never impaired at work.

Respondent's wife, S.L., testified on his behalf. Tr. 170-190. She testified that she has known Respondent since middle school. Tr. 170-71. S.L. testified that she is an addiction counselor and that she and Respondent were divorced in 2008 and remarried in 2018. *Id.* S.L. believes Respondent that he has not used drugs or alcohol in the last six years, because she has

"been there, and also because there's a lot of things in place to ensure that he doesn't." *Id.* at 172-73. When asked why she trusts Respondent, she said, "I didn't start out, you know, trusting him, you know, when he first came out of recovery. But you know, over the years, I've definitely come to trust him. I wouldn't have remarried him if I—if I didn't." *Id.* at 173. She testified about his previous rehabilitation efforts in medical school and stated, that "I think it was a situation where he came out and he did really well when he had some—you know, he was going to meetings. He was doing everything that he needed to do. From that standpoint—stayed sober. I can't remember how many years." *Id.* at 184. But then she stated, "When he stopped going to meetings, when he stopped doing the things that were the basis of recovery, I was a little wary, you know." *Id.* However, she followed, "[a]nd that's why I'm hoping like this time, for me—you know, there's a lot of things that are put in place that—to hold him accountable, and that's been good for me in knowing—you know, it's not on me to keep an eye and try to predict, you know, our behavior, because we can't. We can't." *Id.* When the Chief ALJ asked her if the difference is that there are safeguards in place now, she agreed, but also added that "his general well-being is better. His mental health is better." *Id.* at 186.

The Chief ALJ found, and I agree, that "[n]otwithstanding the obvious reality that [S.L.] has a vested interest in the issuance of a COR to her husband so that they can bring their joint practice plans to fruition, she presented as a generally candid witness whose testimony bore sufficient detail, internal consistency, and plausibility to be afforded credibility in these proceedings." RD, at 20.

Respondent next presented the testimony of Dr. G., who is an "addiction medicine specialist"[16] and who has known Respondent "nine years, probably since 2010." Tr. 191-211. Dr. G. testified that he knew Respondent before and after his recovery, and that before, they were "colleagues in the sense that [Respondent] saw some patients that had some substance use

[16] Respondent's attorney moved to qualify Dr. G. as an expert witness, but the Chief ALJ found, and I agree, that there had not been adequate notice that Respondent would call upon Dr. G. as an expert. Tr. 202-04.

disorders, and it's a small-knit group of people in recovery . . . ." *Id.* at 192. Dr. G. testified that he took over the care of some of Respondent's patients during his addiction. *Id.* at 193. Now, Dr. G. sees Respondent "once a week, every week, for the past six years" as part of a recovery meeting for medical professionals, where they are peers. *Id.* at 194. Dr. G. testified that Respondent has never been impaired at one of those meetings. *Id.* at 201, 206. Dr. G. also described that impression of the difference between Respondent now and his previous acquaintance with Respondent in 2012 as "day and night." *Id.* at 206. He further testified that Respondent has been doing all of the things that are important for recovery. *Id.* at 206-07. He further stated that "[t]he wonderful thing about [the Tennessee Medical foundation contract] is I know [Respondent] every day has to pick up a phone, and he's got to punch in a number and he's got to see if he's being drug screened, seven days a week." *Id.* at 208. He further stated, "It made me think about that when you said would I be able to tell if [Respondent] was doing something. Well, there's not only me, there is the Tennessee Medical Foundation that has advocated for [Respondent], that—he is under their monitoring." *Id.* Dr. G. also testified that he feels Respondent has been rehabilitated and when asked if he would trust his judgment in taking care of patients, he said, "Absolutely." *Id.* at 210.

The Chief ALJ found, and I agree, that some of Dr. G.'s testimony was "likely more broad and optimistic than his objective bases for those positions would justify . . . . [it] was sufficiently detailed, plausible, and internally consistent to be deemed credible in these proceedings." RD, at 24.

The next witness to testify on behalf of Respondent was M.C., who is a licensed clinical social worker and a peer[17] colleague of Respondent for about six years and sees him "anywhere from two to four times a week in person" at work. Tr. 212-13. M.C. testified that he would be

[17] Respondent testified initially that M.C. is charged with monitoring him as he is "the head counselor at the program, which is part of [Respondent's] job role." Tr. 145. However, later he clarified that the "person who does the direct monitoring is Dr. H." *Id.* at 146. It was clear from M.C.'s testimony that he does not monitor Respondent's patient care or "supervise [him] in any way." *Id.* at 226.

able to tell if Respondent ever had come into work impaired, because he is "a recovering drug addict [himself], so [he] know[s] what it looks like, what it smells like, what it tastes like, what it acts like," and he has never seen Respondent impaired. *Id.* at 214-15. M.C. described Respondent as "transparent," because as he stated, "in recovery, if a person's going to get clean, stay clean, they have to get honest." *Id.* at 215. He further stated that he would trust his clinical judgment, although he has never observed him with patients, because he is "behind closed doors." *Id.* at 225-26. The Chief ALJ found, and I agree, that "[w]hile the depth of his knowledge of the Respondent's suitability to discharge the duties of a DEA registrant is extremely limited, M.C. presented testimony that was sufficiently cogent, detailed, plausible, and internally consistent to be considered generally credible." RD, at 25.

Another of Respondent's co-workers, W.J., who is a certified peer specialist and has known Respondent for three and a half years testified on his behalf. Tr. 228-30. He testified that Respondent became his first sponsor, but they became such close friends that he is no longer his sponsor. *Id.* at 233. He said he has never seen Respondent impaired and that he trusts Respondent "with [his] life." *Id.* at 230, 233. The Chief ALJ found, and I agree, that although Respondent's assistance to W.J. is "undoubtedly commendable," "there was very little presented through [W.J.] that can be objectively considered as helpful in determining whether the Agency can have confidence that Respondent can/will discharge his duties as a DEA registrant." RD, at 26.

Respondent's son, C.L., also testified on his father's behalf. He stated that he is studying experimental biological psychology to conduct "addiction and pharmacological research." Tr. 237. He testified that he was interested in the subject because of his parents' work and "the things that we've experienced as a family . . ." *Id*. at 238. When asked about his relationship with his father, he stated, "Today, it's fantastic." He further stated that he believes his father is sober, because "he was just an entirely different person, but you know, it's—hasn't been anything like that in a very long time . . . ." *Id.* at 239. He also testified that he and his father

had built trust and that he trusted his father now, but there was a time when he did not, "because there was no—there was no sort of stability." *Id.* at 243.

Respondent's oldest son, R.L., also testified on his father's behalf. *Id.* at 244-55. He testified that he is a youth minister in North Carolina and working on a master's degree in cultural studies. *Id.* at 247. When asked if he trusts his father, he stated, "I trust that he is—he is moving in—you know, moving in the right direction, and so it's just been, you know exciting and just encouraging for me to see, so yeah. Yes, I do, I trust him." *Id.* at 248-49. He testified that he has seen his father mature, and control his anger. *Id.* at 249-50. When asked if he believes his father has been sober for six years, he said, "I've never seen any evidence of it, never heard any—of anything from my parents, or sisters, or anybody, and continuing to see him grow, so yeah, I believe him." *Id*. at 250.

With respect to both of Respondent's sons, the Chief ALJ found, and I agree, that C.L. and R.L. presented as "loving" sons, "seeking to support [their] father and family." RD, at 21. He found that their testimony was "internally consistent, plausible, and based on the questions [they were] asked, adequately detailed." However, he ultimately found, and I agree, that "there was very little practical value added" by these witnesses as "to a determination of whether the issuance of a [registration] would be in the public interest." *Id.* at 21-22.

Respondent also presented the testimony of the Reverend at his church, where Respondent teaches Sunday school and has "a significant role." Tr. 258. He testified that he has known Respondent for about three years and that he trusts Respondent and described him as reliable—"if he says something, he's going to do that." *Id.* at 260. The Chief ALJ concluded, and I agree, that in part due to the limitations on the time and context that the Reverend has known the Respondent, the Reverend "presented as a responsible dedicated pastor whose testimony however believable, added only minimally to an objective determination of whether the Respondent should be entrusted with a DEA COR." RD, at 27.

III. DISCUSSION

In this matter, as already discussed, the OSC calls for my adjudication of the application for registration based on the charge that Respondent has been convicted of a felony related to controlled substances and that he was excluded from participation in a program pursuant to section 1320a-7(a) of Title 42. OSC, at 1-4; *supra* sections II.A and II.D. Both of these are bases for revocation or suspension or a controlled substances registration under 21 U.S.C. § 824(a)(2) & (a)(5). The OSC does not allege that granting Respondent's application would be inconsistent with the public interest based on consideration of the factors in 21 U.S.C. § 823(f)(1) through (5) (hereinafter, the public interest factors). The Government raised the public interest factors in its Posthearing Brief; however, the Chief ALJ found that they were "unavailable as a basis for sanction in these proceedings," due to the late stage in which they were raised. *See* RD, at 28 n.65. Accordingly, the OSC's specific substantive bases for proposing the denial of Registrant's registration application are his felony conviction and his mandatory exclusion under 21 U.S.C. § 824(a)(2) & (a)(5). OSC, at 1-4.

Prior Agency decisions have addressed whether it is appropriate to consider a provision of 21 U.S.C. § 824(a) when determining whether or not to grant a practitioner registration application. For over forty-five years, Agency decisions have concluded that it is.

In *John R. Amato, M.D.*, 40 Fed. Reg. 22,852 (1975), the Agency issued an Order to Show Cause regarding Dr. Amato's application on November 6, 1974. *Id.* The Order to Show Cause referenced a medical license revocation issued by the New Jersey Board of Medical Examiners. *Id.* The Agency's analysis began by citing, and agreeing with, Administrative Law Judge Parker's conclusion, "as a matter of law," that the state dispensing authority requirement of section 823(f) "must logically give the Administrator the authority to deny a registration if the practitioner is not authorized by the State to dispense controlled substances."[18] *Id.* The Administrator agreed, stating "[t]o hold otherwise would mean that all applications would have

[18] Section 303(f) states that the Attorney General shall register practitioners if they have authority to "dispense . . . controlled substances under the laws of the State in which . . . [they] practice[ ]." 21 U.S.C. § 823(f).

to be granted only to be revoked the next day under 21 U.S.C. 824(a)(3)." *Id.* The Administrator also stated that "[t]his agency has consistently held that where a registration can be revoked under section 824, it can, *a fortiori*, be denied under section 823." *Id.* The Administrator stated that he accepted Judge Parker's recommendation that the application be denied because Dr. Amato lacked authority in New Jersey "to administer, dispense or prescribe controlled substances." *Id.*

Other Agency decisions from the 1970s and 1980s similarly concluded that a provision of section 824 may be the basis for the denial of a practitioner registration application. *See, e.g., Arthur R. Black, D.O.*, 49 Fed. Reg. 33,183, 33,183 (1984) (denying practitioner registration application for "two lawful grounds": a federal felony conviction and material falsification of the application); *Brady Kortland Fleming, D.O.*, 46 Fed. Reg. 45,841, 45,842 (1981) (denying practitioner registration application due to past controlled substance-related federal felony conviction); *Thomas W. Moore, Jr., M.D.*, 45 Fed. Reg. 40,743, 40,743-44 (1980) (denying practitioner registration application due to past controlled substance-related federal felony convictions); *Raphael C. Ciliento, M.D.*, 44 Fed. Reg. 30,466, 30,466 (1979) (denying practitioner registration application due to past controlled substance-related state felony conviction and applicant's decision not to attend the hearing he requested and show why denial is not appropriate).

I agree with the results of all of these Agency decisions.

An Agency decision from the 1990s, when the practitioner portions of sections 823 and 824 looked more like they do today than when the Agency decided the above-cited decision, likewise concluded that a practitioner registration application may be denied based on a provision of section 824. *Dinorah Drug Store, Inc.*, 61 Fed. Reg. 15,972 (1996). *Dinorah* is the adjudication of a practitioner registration application by a retail pharmacy. *Id.* at 15,972. The Order to Show Cause referenced 21 U.S.C. § 823(f) as well as 21 U.S.C. § 824(a)(5) (mandatory exclusion from federal health care programs). *Id.*

The parties disagreed on whether a provision of section 824 could be the basis for the denial of a pharmacy's registration application. *Id.* at 15,973. The Government's position was that section 824(a)(5) "is to be construed as not only grounds for the suspension or revocation of a DEA registration, but also as a basis for the denial of an application for a DEA registration." *Id.* The pharmacy's position was that section 824(a)(5) is "limited to the revocation or suspension of already existing registrations." *Id.*

According to the Agency's decision in *Dinorah*:

> To reject 21 U.S.C. 824(a)(5) as a basis for the denial of DEA registration makes little sense. The result would be to grant the application for registration, only to possibly turn around and propose to revoke or suspend that registration based on registrant's exclusion from a Medicare program. A statutory construction which would impute a useless act to Congress will be viewed as unsound and rejected. South Corp. v. United States, 690 F.2d [1369], 1374 (Fed. Cir. 1982).

Id. In other words, the basis for the decision's conclusion is statutory construction as articulated by the Federal Circuit. *Id.* The decision thus concluded that "21 U.S.C. 824(a)(5) may serve as a basis for the denial of a DEA registration." *Id.*

Dinorah is also instructive for its analysis of the application and its conclusion to grant the application despite the mandatory exclusion. *Id.* at 15,973-74. The decision, citing the ALJ, agreed that "[s]ince denial of registration under Section 824(a)(5) is discretionary, the factors listed in Section 823(f) may be considered in determining whether the granting of [the] Respondent's application is inconsistent with the public interest." *Id.* at 15,973. The decision analyzed each of the public interest factors, finding each of them relevant. *Id.* at 15,973-74; 21 U.S.C. § 823(f). The Deputy Administrator's analysis of the public interest factors was favorable to the pharmacy, while he explicitly stated that he did not "condone" the fraudulent activity in which the pharmacy and its owner had engaged. 61 Fed. Reg. at 15,974. Accordingly, the Deputy Administrator approved the pharmacy's registration application. *Id.* I agree with my predecessor's conclusion that a provision of section 824 may be the basis for the denial of a practitioner registration application and that allegations related to section 823 remain

relevant to the adjudication of a practitioner registration application when a provision of section 824 is involved.

Accordingly, when considering an application for a registration, I will consider any allegations related to the grounds for denial of an application under 823 and will also consider any allegations that the applicant meets one of the five grounds for revocation or suspension of a registration under section 824. *See id.* at 15,973-74.

i. 21 U.S.C. § 823(f): The Five Public Interest Factors

Pursuant to section 303(f) of the CSA, "[t]he Attorney General shall register practitioners . . . to dispense . . . controlled substances . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices." 21 U.S.C. § 823(f). Section 303(f) further provides that an application for a practitioner's registration may be denied upon a determination that "the issuance of such registration . . . would be inconsistent with the public interest." *Id.* In making the public interest determination, the CSA requires consideration of the following factors:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety. 21 U.S.C. § 823(f).

In this case, it is undisputed that Respondent holds a valid state medical license and is authorized to dispense controlled substances in the State of Tennessee where he practices. RX

17, 18. The Government did not allege that Respondent's registration would be inconsistent with the public interest pursuant to section 823 in the OSC and did not advance any arguments or present any evidence under the public interest factors in its case at hearing. *See* OSC; Govt Prehearing. Instead, the Government based its initial case in section 824 alleging that Respondent's conviction of a felony related to controlled substances and his mandatory exclusion from federal health programs merit the denial of his registration under 21 U.S.C. § 824(a)(2) & (a)(5). *See* OSC; Govt Prehearing. Because the Government has not alleged that Respondent's registration is inconsistent with the public interest under section 823, I will not deny Respondent's application based on section 823, and although I have considered 823, I will not analyze Respondent's application under the public interest factors. Therefore, in accordance with prior agency decisions, I will move to assess whether the Government has proven by substantial evidence that one or more grounds for revocation exist under 21 U.S.C. § 824(a).

ii. 21 U.S.C. § 824(a)(2) & (a)(5)

Each subsection of section 824(a) provides an independent ground to impose a sanction on a registrant. *Arnold E. Feldman, M.D.*, 82 Fed. Reg. 39,614, 39,617 (2017); *see also Gilbert L. Franklin, D.D.S.,* 57 Fed. Reg. 3,441 (1992) ("[M]andatory exclusion from participation in the Medicare program constitutes an independent ground for revocation pursuant to 21 U.S.C. [§] 824(a)(5)."). Pursuant to 824(a)(2), the Attorney General is authorized to suspend or revoke a registration "upon a finding that the registrant . . . has been convicted of a felony under this subchapter or subchapter II of this chapter or any other law of the United States . . . relating to any substance defined in this subchapter as a controlled substance or a list I chemical." 21 U.S.C. § 824(a)(2). The ground in 21 U.S.C. § 824(a)(5) requires that the registrant "has been excluded (or directed to be excluded) from participation in a program pursuant to section 1320a-7(a) of Title 42." 42 U.S.C. § 1320a-7(a) provides a list of four predicate offenses for which exclusion from Medicare, Medicaid, and other federal health care programs is mandatory and sets out mandatory timeframes for such exclusion. *Id.*

Here, there is no dispute in the record that Respondent is mandatorily excluded pursuant to Section 1320a-7(a) of Title 42 and, therefore, that a ground for the revocation or suspension of Registrant's registration exists. 21 U.S.C. § 824(a)(5). There is also no dispute in the record that Respondent has been convicted one count of "Conspiracy to Distribute a Quantity of Cocaine Base," in violation of 21 U.S.C. §§ 841(b)(1)(C) & 846, which constitutes a felony conviction "relating to" controlled substances as those terms are defined in 21 U.S.C. § 824(a)(2). *William J. O'Brien, III, D.O.*, 82 Fed. Reg. 46,527, 46,529 (2017).

Where, as here, the Government has met its *prima facie* burden of showing that two grounds for revocation exists, the burden shifts to the Registrant to show why he can be entrusted with a registration. *See Jeffrey Stein, M.D.,* 84 Fed. Reg. 46,968, 46,972 (2019).

IV. SANCTION

Where, as in the instant case, the Government has established grounds to deny a registration, I will review any evidence and argument the respondent submitted to determine whether or not the respondent has presented "sufficient mitigating evidence to assure the Administrator that [he] can be trusted with the responsibility carried by such a registration." *Samuel S. Jackson, D.D.S.*, 72 Fed. Reg. 23,848, 23,853 (2007) (quoting *Leo R. Miller, M.D.*, 53 Fed. Reg. 21,931, 21,932 (1988)). "'Moreover, because "past performance is the best predictor of future performance," *ALRA Labs, Inc. v. Drug Enf't Admin.*, 54 F.3d 450, 452 (7th Cir. 1995), [the Agency] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [the registrant's] actions and demonstrate that [registrant] will not engage in future misconduct.'" *Jayam Krishna-Iyer*, 74 Fed. Reg. 459, 463 (2009) (quoting *Medicine Shoppe*, 73 Fed. Reg. 364, 387 (2008)); *see also Samuel S. Jackson, D.D.S.*, 72 Fed. Reg. at 23,853; *John H. Kennnedy*, M.D., 71 Fed. Reg. 35,705, 35,709 (2006); *Prince George Daniels, D.D.S.*, 60 Fed. Reg. 62,884, 62,887 (1995). The

issue of trust is necessarily a fact-dependent determination based on the circumstances presented by the individual respondent; therefore, the Agency looks at factors, such as the acceptance of responsibility and the credibility of that acceptance as it relates to the probability of repeat violations or behavior and the nature of the misconduct that forms the basis for sanction, while also considering the Agency's interest in deterring similar acts. *See Arvinder Singh, M.D.,* 81 Fed. Reg. 8247, 8248 (2016).

In evaluating the degree required of a respondent's acceptance of responsibility to entrust him with a registration, in *Mohammed Asgar, M.D.*, the Agency looked for "unequivocal acceptance of responsibility when a respondent has committed knowing or intentional misconduct." 83 Fed. Reg. 29,569, 29,572 (2018) (citing *Lon F. Alexander, M.D.*, 82 Fed. Reg. 49,704, 49,728). Here, Respondent pled guilty to one count of "Conspiracy to Distribute a Quantity of Cocaine Base," in violation of 21 U.S.C. §§ 841(b)(1)(C) & 846, and one count of "Conspiracy to Defraud a Health Care Benefit Program," in violation of 18 U.S.C. §§ 1347 & 1349. *U.S. v. Robert Wayne Locklear*, No. 2:14-CR-38 (E.D. Tenn. Oct. 8, 2014)). I will, therefore, look for a clear acceptance of responsibility from Respondent.

Respondent took concrete actions to accept responsibility for his misconduct while his criminal case was ongoing. He did so by pleading guilty to the charges in Federal Court. Respondent testified that he pled guilty in federal court "because he was guilty" and that he was "[v]ery. Very sorry." Tr. at 34. However, after his arrest, he was given the option of entering an inpatient rehabilitation program in lieu of incarceration, and after only six days, he escaped, because he "wanted to use drugs." *Id*. at 67-68. By his own admission, it was not until he had been "in jail long enough," that he was fully ready to accept rehabilitation. *Id.* at 167. It is difficult to credit Respondent's guilty pleas as full acceptance of responsibility given his behavior after his arrest.

Regarding Respondent's acceptance of responsibility for the health care benefit fraud, the Chief ALJ found, and I agree that:

> During his testimony, the Respondent complacently agreed that allowing unqualified administrative staff personnel to hand out controlled substance prescriptions while he was absent from his office due to his drug and alcohol abuse was "[e]xtremely dangerous." Tr. 160. He even allowed that he "put [his staff] at risk, as well as the patient," but his demeanor conveyed no indication that he regretted his actions or even recognized the monetary and safety ramifications of those actions. The message his nonchalant testimonial demeanor conveyed was that it happened, he got caught, and his actions merited no further reflection.

RD, at 32. I defer to the Chief ALJ's assessment of Respondent's demeanor. Because the Administrative Law Judge has had the opportunity to observe the demeanor and conduct of hearing witnesses, the factual findings regarding demeanor set forth in his recommended decision are entitled to significant deference. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *Jeffery J. Becker, D.D.S., and Jeffery J. Becker, D.D.S., Affordable Care*, 77 Fed. Reg. 72,387, 72,403 (2012). I find the Chief ALJ's characterization of Respondent's reaction in making these statements to be important in this case, particularly because the illegal conduct involved the prescribing of controlled substances—the very responsibility with which Respondent now seeks to be entrusted. Furthermore, the magnitude of the offense is staggering—the plea agreement included 150 dates of service where a prescription was issued and Respondent was not present to examine the patient. GX 3, at 13. The offense therefore, warranted much more attention and focus from Respondent in accepting responsibility. This crime did not just affect federal health care programs, but also the patients, who were not receiving adequate medical care, and Respondent's staff, who as Respondent noted, he put at risk for malpractice and even potential criminal liability. The plea agreement also noted that "[o]n numerous occasions, drug screens came back positive for the presence of other scheduled drugs such as marijuana or heroin, but the patients continued to have their Suboxone prescriptions called in anyway." GX 3, at 9. Additionally, Respondent admitted that he saw patients after smoking crack cocaine. *Id.* at 5. This behavior is directly related to his controlled substance

registration—and I find that the magnitude of the harm that he caused and could have caused merited more than a "nonchalant" admission.[19]

Regarding Respondent's acceptance of responsibility for his felony conviction for Conspiracy to Distribute a Quantity of Cocaine Base, he testified that he accepts responsibility and is remorseful. Tr. 134-35. Although he made these overall statements, in the affidavit he submitted, he stated that he "admitted on the day [he] was arrested by the Drug Task Force that, although [he] never sold any illegal substances, [he] shared some crack cocaine with others that same day." RX 7. Respondent seems to assume that the act of sharing somehow would improve my view of his actions, when in truth the fact that he distributed an illegal substance to others is serious misconduct in considering whether he can be entrusted with a controlled substance registration, irrespective of whether he did so as a gift or for payment. In sharing crack cocaine, he endangered the lives of these individuals and brought them further into the same spiral of addiction in which he was swirling. This statement, which qualifies what he did not do, appears to be aimed at minimizing the egregiousness of his conduct, which the Agency has previously weighed against a finding of acceptance of full responsibility. *See Ronald Lynch, M.D.*, 75 Fed. Reg. 78,745, 78,754 (2010) (Respondent did not accept responsibility noting that he "repeatedly attempted to minimize his [egregious] misconduct"; *see also Michael White, M.D.*, 79 Fed. Reg. 62,957, 62,967 (2014) (finding that Respondent's "acceptance of responsibility was tenuous at best" and that he "minimized the severity of his misconduct by suggesting that he thinks the requirements for prescribing Phentermine are too strict.").

As to his demeanor in his acceptance of responsibility for the felony charge, the Chief ALJ remarked that Respondent "cooly related" the events leading up to his arrest. RD, at 33. He further stated that:

> If the Respondent understands that doling out crack cocaine in a hotel room, particularly when committed by one who had been entrusted with a DEA registration, was

[19] There is no mention at all of the conduct related to prescribing in the affidavit Respondent submitted, *see* RX 7, and he submitted no testimony on his own about this specific matter. The Chief ALJ had to ask him about the controlled substances prescriptions in the plea agreement. Tr. 160.

> reprehensible, that understanding was reflected in neither his language nor his tone during the hearing. In his testimony, he described his actions with no more emotion than if he were recounting an uneventful shopping trip to a local mall.

RD, at 34.

I also find it of significance in evaluating Respondent's acceptance of responsibility that he did not seem to be aware of the full extent of the harm that he caused. For example, when the Chief ALJ asked him what happened to his bail when he escaped from Bradford, Respondent testified that it was "lost," and he could not remember how much it was, but his "wife could probably tell you for sure." Tr. 70-71; *supra* n.8. And, again, when asked about whether he posted bail after Talbott, he answered that it was "fuzzy," and "I think there might have been." *Id.* at 78. The fact that he did not fully understand the financial impact on his family and left the responsibility of that knowledge to his wife, does not demonstrate full acceptance of responsibility for his misconduct.

Further, the Chief ALJ noted, and I agree, that Respondent "was repeatedly successful in convincing persons in authority to afford him the benefit of rehabilitation." *Id.* at 35; *see* Tr. 152-53 (Duke Medical School); Tr. 153-59 (Takoma Medical Center); Tr. 162 (District Court Judge who sent him to Bradford); Tr. 168-69 (District Court Judge sent him to Talbott after he escaped from Bradford); Tr. 78-79 (released after Talbott). Like the Chief ALJ, I find Respondent's admission that he described his statements to a District Court Judge that he could not go back to Bradford Rehabilitation as "an angle to go somewhere else," *id.* at 73, to be of particular concern, s*ee* RD, at 36. Although I credit his retrospective honesty, in deciding whether I can trust him, I cannot ignore the fact that he has successfully angled to obtain trust repeatedly, and repeatedly abused that trust.

The Agency has decided that the egregiousness and extent of the misconduct are significant factors in determining the appropriate sanction. *Garrett Howard Smith, M.D.*, 83 Fed. Reg. at 18,910 (collecting cases). The Agency has also considered the need to deter similar acts by a respondent and by the community of registrants. *Id.* In this case, there is no doubt that

the Respondent's felonies and past behavior are egregious. His acts related to his controlled substances registration—instructing unqualified staff to issue controlled substances prescriptions on his behalf and without properly considering contrary urine drug screens, I find to be particularly egregious. Further, as the Chief ALJ stated, "intentionally and volitionally distributing crack cocaine is a grave departure from even the most minimal standard of responsibility to guard against diversion that is expected of a DEA registrant. It is not that he just came up short in preventing drug diversion, he intentionally diverted crack cocaine." RD, at 39.

As the Chief ALJ noted, although the Agency has permitted registrants to maintain or obtain registrations based on demonstrated unequivocal acceptance of responsibility and "concrete, sincere efforts at rehabilitation," many of these cases involved no harm to anyone beyond the respondent and no grounds for revocation under Section 824; whereas, in this case, the "record reflects the distribution of crack to others, the placement of his patients in extreme danger, professional (even criminal) exposure inflicted on his office staff, and monetary damages to various health care providers who submitted reimbursement claims." RD, at 38 (citing *Ronald F. Lambert, D.D.S.*, 78 Fed. Reg. 62,662, 62,664 (2013); *Kimberly Maloney, N.P.*, 76 Fed. Reg. 60,922, 60,927-28 (2011); *John J. Cienki, M.D.* 63 Fed. Reg. 52,293, 52,296 (1998) (parentheticals omitted)).

Generally, I find Respondent's recovery to be commendable given his lengthy and difficult battle with addiction. Respondent cited the support of his friends and family numerous times as being essential to his recovery. Tr. 128-29, 136, 137. Although the testimony of his network of family and friends who support him is important to understanding their opinions about the status of his recovery, I find that overall, their opinions are not the best evidence for me to use to determine my ability to be entrust Respondent with a controlled substances registration. *See Raymond A. Carlson*, 53 Fed. Reg. 7425 (1988) (finding that none of the character "witnesses was in a position to make an adequate assessment of [r]espondent's ability to properly

handle controlled substances."). Further, I find that the record evidence of Respondent's egregious controlled substance dispensing-related violations is relevant to my evaluation and outweighs all of the record evidence from his family, friend, colleague, and minister that he has been generally trustworthy and reliable since his recovery. *See George Pursley, M.D.* 85 Fed. Reg. 80,162, 80,180 (2020).

In addition to acceptance of responsibility, the Agency also gives consideration to both specific and general deterrence when determining an appropriate sanction. *Daniel A. Glick, D.D.S.*, 80 Fed. Reg. 74,800, 74,810 (2015). Specific deterrence is the DEA's interest in ensuring that a registrant complies with the laws and regulations governing controlled substances in the future. *Id.* General deterrence concerns the DEA's responsibility to deter conduct similar to the proven allegations against the respondent for the protection of the public at large. *Id*. In this case, I agree with the Chief ALJ that "the absence of a sanction where a DEA registrant has been convicted of actually intentionally distributing crack cocaine would send a powerful message to the regulated community that even the most blatant intentional diversion will carry no consequences." RD, at 40.

In Respondent's favor, Respondent has been held accountable for his criminal behavior—having been sentenced to prison and temporarily losing his medical license. He has met the requirements for rehabilitation and for obtaining a conditional medical license. However, based on the facts of this case, I find it difficult to find that this accountability will have a deterrent effect on the potential for Respondent's relapse, because he has faced serious consequences many times in his life—losing his wife and family, getting expelled from medical school, losing his job, getting arrested, going to jail, etc.—and none of those things seemed to deter him from repeating his behavior until now.

Although Respondent testified extensively about the accountability to which he is held pursuant to his agreement with the Tennessee Medical Foundation, and many of his character witnesses testified about how much that accountability comforted them, I cannot find that

accountability necessarily to be a sufficient deterrent from abuse of his controlled substances registration due to his history of repeatedly ignoring accountability measures,[20] even at the risk of incarceration. Therefore, in spite of his commendable sobriety thus far, I have reason to doubt his claim that he would always be a compliant registrant. *See George R. Smith, M.D.*, 78 Fed. Reg. 44,972, 44,980 (2013). Particularly, I remain concerned that if he relapsed, which the record has demonstrated previously occurred on several occasions, while entrusted with a controlled substances registration, he could harm himself and others too quickly for detection by this Agency or his monitoring. Ensuring that a registrant is trustworthy to comply with all relevant aspects of the CSA without constant oversight is crucial to the Agency's ability to complete its mission of preventing diversion within such a large regulated population. *Jeffrey Stein, M.D.*, 84 Fed. Reg. at 46,974.

As discussed above, to receive a registration when grounds for denial exist, a respondent must convince the Administrator that his acceptance of responsibility and remorse are sufficiently credible to demonstrate that the misconduct will not reoccur and that he can be entrusted with a registration. Having reviewed the record in its entirety, I find that Respondent has not met this burden. Accordingly, I will order the denial of Respondent's application for a certificate of registration.

ORDER

Pursuant to 28 C.F.R. § 0.100(b) and the authority vested in me by 21 U.S.C. § 823(f), I hereby deny the pending application for a Certificate of Registration, Control Number W18124612C, submitted by Robert Wayne Locklear, M.D., as well as any other pending application of Robert Wayne Locklear, M.D. for additional registration in Tennessee. This Order is effective [insert Date Thirty Days From the Date of Publication in the Federal Register].

[20] There is also evidence on the record that at the time of the hearing that Respondent might not have been in compliance with his monitoring requirements due to his monitor's illness and that he did not inform the state board or the Tennessee Medical Foundation of the lapse in monitoring. *See supra* n.14. I find that this lapse is mitigated by its circumstances, but that it is further evidence that Respondent has repeatedly demonstrated disregard for accountability measures.

D. Christopher Evans,
Acting Administrator.

[FR Doc. 2021-13525 Filed: 6/24/2021 8:45 am; Publication Date: 6/25/2021]